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Supreme Court of the United States

OCTOBER TERM 1978

No. 77-1212

RAMON RODRIGUEZ,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

Page

Table of Cases iii

Jurisdiction 2

Questions Presented 2

Statutes Involved 3

Statement of the Case 5

REASONS FOR GRANTING THE WRIT:

1. Did the Government Fail in its Burden of Proof to Sustain Each Element of the Criminal Charge Beyond a Reasonable Doubt? 8

2. Was the Petitioner Deprived of His Constitutional Right to a Fair Trial? 12

   A. Was the Petitioner Denied to a Fair Trial by Virtue of the Judge's Reference to Him as a "*convict*" During the Judge's Charge to the Jury? 12

   B. Was the Judge's Curative Instructions Sufficient to Eliminate Prejudice Against the Petitioner from the Jury's Mind? 15

3. Was the Manner in Which Petitioner Was Sentenced A Denial of Due Process and Equal Protection Under the Law? 19

   A. Where Petitioner's Sentence Exceeded His Co-Defendant's on the Basis of Sex Discrimination, had the Petitioner Been Denied Due Process and Equal Protection Under the Law? .. 19

B. Where the petitioner Chose to Exercise His Right to Trial by Jury and Was Found Guilty of a Conspiracy Count and Received A Maximum Sentence Thereon, Was He Denied Due Process and Equal Protection Under the Law Where the Co-Defendants Who Pleaded Guilty Received Suspended Jail Sentences? 21

C. Petitioner's Sentence Is Disproportionately Greater Than Those of Persons Sentenced for the Commission of the Same Crime 24

D. Is the Sentence of the Petitioner Illegal in Violation of 21 U.S.C., Section 851(a)(B)? 25

Conclusion 34

Appendices

Notice of Entry 1a

U.S. Court of Appeals Order Affirming Conviction 3a

Indictment 5a

The Drug Enforcement Administration's Survey of the Court Disposition of Defendants for the Period of January 1977 through June 1977 ..... 8a

TABLE OF CASES

	Page
Abie State Bank v. Bryan, 282 U.S. 765, 772 (1921)	8
Barbier v. Connolly, 113 U.S. 27, 31 (1885)	31
Bolling v. Sharpe, 347 U.S. 497, 499 (1954)	31
Brown v. Board of Education, 347 J.S. 483, 494-95 (1954)	30
Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705	12
Furman v. Georgia, 408 U.S. 238, 242-57 (Douglas, J., concurring, 364-66; Marshall, J. concurring) (1972)	30, 33
Griffin v. Illinois, 351 U.S. 12 (1956)	32
Hodgson v. Vermont, 168 U.S. 262, 273 (1897)	31
In re Gault, 387 U.S. 1 (1967) (Criminal process; age) ...	32
LaFave & Scott, Criminal Law, Hornbook Series pp. 45-46	14
Loving v. Virginia, 388 U.S. 1 (1967)	30
Leary v. United States, 395 U.S. 6 (1969)	29
Matter of Richard S., 27 N.Y.2d 802, 315 N.Y.2d 861, 264 N.E.1d 353; see CPL 70.20	14
People v. Crimmins, 367 N.Y.S.2d 213	14
People v. Sinclair, 387 Mich. 91, 194, N.W.2d 878 (1972)	28
Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) ...	29
People v. McCabe, 49 Ill. 2d 338, 275 N.E.2d 407 (1971)	28
Post v. United States (1894), 161 U.S. 583, 16 S.Ct. 611 .	11

Quercia v. United States, 289 U.S. 466, 472, 53 S.Ct. 698, 700, 77 L.Ed. 1231 (1933) 16

Rener v. Beto, 447 F.2d (5th Cir. 1971), cert denied, 405 U.S. 1051 (1972) 28

Schneider v. Rush, 377 U.S 163, 168 (1964) 31

Scott v. United States, 135 U.S. App. D.C. 377, 419 F.2d 264, 266-7 (1969) 23

Skinner v. Oklahoma, 316 U.S. 535 (1942) 31

Turner v. United States, 396 U.S. 398, 418-19 (1970) ... 29

Weems v. United States, 217 U.S. 349 (1910) 33

Williams v. Oklahoma, 358 U.S. 576, 79 S.Ct.421 (1959) 23

Yick Wo v. Hopkins, 118 U.S. 356 (1973) 30

Townsend v. Burke, 334 U.S. 736, 68 Sup.Ct. 1252 ... 23

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) 30

Pinkerton v. United States, 328 U.S. 640 (1946) 10

Suhl v. United States, 390 F.2d 547 (C.A. 9 1968) cert. den. 391 U.S. 946, 88 S.Ct. 2035 10

United States v. Borelli, 336 F.2d 376 (2d Cir. 1964) 8

United States v. Bryson, 16 FRD 431 (1954 D.C.N.D. Cal.) 11

United States v. Daniels, 446 F.2d 967 (C.A. 6 1971) ... 23

United States v. Di Re, 159 F.2d 818 (2d Cir. 1947) 9

United States v. Kiffer, 447 F.2d 349 (2d Cir.) cert. denied, 414 U.S. 831 (1973) 28

United States v. Mancino, 179 F.Supp. 897 (1960 S.D.N.Y.) 11

United States v. Murphy, 527 F.2d 401 (C.A. Tex. 1967) 9

United States v. Renda, 56 F.wd 601, 602 (2d Cir. 1932) 10

United States v. Smaldone, 484 F.2d 311, 320 (10th Cir. 1973) 29

United States v. Wiley, 278 F.2d 500 (C.A. 7 1960) 23

Authorities

United States Constitution
Fifth Amendment 24
Fourteenth Amendment 22

United States Code
21 U.S.C. Section 846 1
21 U.S.C. Section 841(a)(1) 1
21 U.S.C. Section 841(a)(2) 3

Other Authorities

5 ALR 3rd 976 14

White Paper on Drug Abuse, Published in September 1975, by the White House Domestic Council Drug Abuse Task Force 27

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1978

No. . . . . .

RAMON RODRIGUEZ,

Petitioner.

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOP ^ WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on the 9th day of February, 1978, which affirmed a judgment of conviction heard with a jury before the Honorable Lawrence A. Whipple in the United States District Court for the District of New Jersey on each of three counts as follows:

(1) Count 1 — Violation of Title 21, U.S.C., Section 846 (conspiracy to possess and distribute cocaine);

(B) Count 2 — Violation of Title 21, U.S.C., Section 841(a)(1) (possession of cocaine with intent to dietribute);

(C) Count 3 — Violation of Title 21, U.S.C., Section 841(a)(1) (distribution of cocaine).

Appellant was sentenced as follows:

(A) As to Count 1 — 15 years in prison snd three years special parole;

(B) As to Count 2 — 5 years in prison and three years special parole;

(C) As to Count 3 — 15 years in prison and three years special parole.

The sentence on Count 2 to run *consecutive* with that imposed on Count 3 and the sentence on Count 3 to run *concurrent* with the sentence imposed on Count 1, thus making a cumulative sentence of twenty (20) years in prison and three (3) years special parole.

THE OPINION BELOW

The case was affirmed without opinion by the United States Court of Appeals for the Third Circuit. This case has not yet been reported. A copy of the order affirming the conviction is attached herein.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Third Circuit was entered on the 9th day of February, 1978. No requests have been made for extensions of time to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1), United States Code.

QUESTIONS PRESENTED

1. Did the Government fail to sustain in its burden of proof each element of the crimes charged beyond a reasonable doubt?

2. Was the petitioner deprived of his constitutional right to a fair trial?

(a) Was the petitioner denied a fair trial by virtue of the Judge's reference to him as a *"convict"* during the Judge's charge to the jury?

(b) Was the Judge's curative instructions

sufficient to eliminate prejudice against the petitioner from the jury's mind?

3. Was the manner in which petitioner was sentenced a denial of due process and equal protection under the law?

(a) Where petitioner's sentence exceeded his co-defendant's on the basis of sex discrimination, has the petitioner been denied due process and equal protection under the law?

(b) Where the petitioner chose to exercise his right to trial by jury and was found guilty of a conspiracy count and received a maximum sentence thereon, was he denied due process and equal protection under the law where the co-defendants who pleaded guilty received suspended jail sentences?

(c) Is the sentence of the petitioner illegal in violation of 21 U.S.C., Section 841(a)(1)(b)?

STATUTES INVOLVED

21 U.S.C. 841

"(a) Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled sustance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

"(b) Except as otherwise provided in section 405 (21 U.S.C. §845), any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(a) In the case of a controlled substance in schedule I or II which is a narcotic drug, such person shall be sentenced to a term of im-

prisonment of not more than 15 years, a fine of not more than $25,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years, a fine of not more than $50,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 6 years in addition to such term of imprisonment.

(b) In the case of a controlled substance in schedule I or II which is *not a narcotic drug* or in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine of not more than $15,000, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of the United States relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine of not more than $30,000, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least

2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment."

21 U.S.C. 846

"Any person who attempts or conspires to commit any offense defined in this title is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy. (Oct. 27, 1970, P.L. 91-513, Title II, Part D, §406, 84 Stat. 1265)."

STATEMENT OF CASE

With respect to the charges, the following witnesses testified on behalf of the Government:

1. *Alejandro Andino* received immunity from prosecution upon his taking the witness stand. He stated that he had known the petitioner for a long period of time. He further stated that he met petitioner's co-defendant DeMarsico in Pink's Bar in Passaic, New Jersey, and that they engaged in a conversation relating to cocaine. That thereafter, Andino, DeMarsico and petitioner's co-defendant Glen Mancini and a person named Benny, went to Brooklyn to buy cocaine. It is not alleged by the Government that the petitioner knew of or participated in this transaction, nor is it alleged by the Government that anyone involved in the Brooklyn purchase of cocaine had made contact with the petitioner at this point.

Andino further testified that the petitioner refused to sell cocaine to Artie DeMarsico "because he is white". Andino then testified that he thereafter made other purchases of cocaine from the petitioner, which purchases were made on behalf of DeMarsico, who then, together with the named co-defendants, Mancini, Pavone and Beggs,

distributed the cocaine in the State of Ohio. On cross-examination, Andino admitted that he had perjured himself in a Jew Jersey State case involving possession of cocaine when he denied that he never used or possessed cocaine. Andino's only reference to a connection between the petitioner and the District of New Jersey was that the witness claimed that he told the petitioner that the former lived in New Jersey and that on one occasion petitioner visited Andino at his home and that said visit had nothing to do with drugs. Andino was not charged in the indictment either as an unindicted co-conspirator or a named co-defendant.

2. *Arthur DeMarsico* had pleaded guilty to his participation in the conspiracy as charged in Count 1 of the indictment and further testified that his wife, co-defendant Cynthia Beggs, pleaded guilty to a misdemeanor of possession of cocaine at the same time. DeMarsico testified that he faced New Jersey State charges with respect to possession of cocaine with intent to distribute and that the Jersey State charges had not been disposed of at the time the instant case was moved for trial. DeMarsico stated that he met Andino in September, 1975, at Pink's Bar in Passaic and was introduced to Andino by DeMarsico's friend, Benny. DeMarsico stated that he went to Brooklyn with Andino to purchase cocaine and that approximately three weeks after meeting Andino he went to the Bronx with Andino and made a purchase of cocaine, which purchase did not involve the petitioner herein.

Thereafter, DeMarsico went with Andino to Ralph's Corner Bar in the Bronx where he met the petitioner herein and that *he had no conversation with the petitioner* other than to bid him hello. Thereafter, Andino and the petitioner left DeMarsico's presence and sometime thereafter Andino returned and had on his person an eighth of cocaine. DeMarsico testified that he went to the Bronx with Andino on several other occasions but that he

never engaged in conversation with the petitioner *nor did he ever see the petitioner give Andino cocaine,* nor did he ever receive any cocaine from the petitioner directly.

3. *Special Agent Oakley [DEA].* Agent Oakley stated that he met the witness Andino at the offices of the DEA on May 12, 1976, and that Andino gave him information on people who he stated were trafficing in drugs. The names given were those of the petitioner, Rosa Rodriguez, Glen Mancini, Arthur DeMarsico, Juan Prado, Michael Pavone and Cynthia DeMarsico (Cynthia Beggs). While working in an undercover capacity, Agent Oakley was introduced to DeMarsico by Andino under the pretext that Oakley was a dealer in cocaine and that Oakley could supply DeMarsico with cocaine. As a result of the meeting Agent Oakley had a tape recorder secreted on his body and made a recording of the conversation between himself and DeMarsico. Agent Oakley further testified that he never recorded a conversation between himself and the petitioner nor did he ever place a telephone call to the petitioner for the purpose of confirming whether or not what Andino told him about the petitioner was true.

The petitioner submitted no evidence or testimony on his own behalf and rested upon the presumption of innocence. The petitioner was found guilty on all counts.

REASONS FOR GRANTING THE WRIT

Did the Government Fail in Its Burden of Proof to Sustain Each Element of the Criminal Charge Beyond A Reasonable Doubt?

In a trial where the government proves that the petitioner is part of a different conspiracy than that charged in the indictment, or that there are multiple conspiracies, and that the petitioner is not a member of the multi-group, or in other words, that he is a member of a different group, he is not guilty of the conspiracy charged in the indictment, and he must be acquitted. *U.S. v. Borelli*, 336 F.2d 376 (2d Cir. 1964).

The Supreme Court also stated that if the petitioner entered into a series of separate illegal transactions, none of which were dependent upon each other, and the petitioner had no interest in the success of the other participants, then the charge of conspiracy as alleged in the indictment herein has not been proved. *Kotteacos v. U.S.*, 328 U.S. 750.

Upon the trial it was established by the testimony of the government's witness Andino, that in 1975, Andino met the government's witness DeMarsico in Pink's Bar in Passaic, N.J. (R.P. 1,28), that they engaged in conversation relating to cocaine and that Andino, co-defendant DeMarsico, co-defendant Glenn Mancini, and a person named Benny, went to Brooklyn to buy cocaine. (R.P. 1,29). A conspiracy was then and there established without the petitioner knowing of its existence. Sometime thereafter, in an effort to purchase more cocaine, Andino allegedly went with DeMarsico to a bar in the Bronx, where they allegedly met the petitioner herein. (R.P. 130-131). Andino then testified that while the petitioner allegedly agreed to sell Andino cocaine, he refused to sell cocaine to DeMarsico. (R.P. 131). At that point, the petitioner refused to become part of the group which was engaged in the distribution of

cocaine, rather it is alleged that he confined his illicit activities to the alleged sale of cocaine to Andino.

The record is void of any statement by any witness that the petitioner was a party to a plan, scheme, or agreement between himself and anyone else with respect to the alleged illicit dealings in cocaine. Nowhere is there any evidence that one alleged sale by petitioner to Andino was conditioned upon any further sales, rather, each transaction was separate and distinct, and not made according to any common plan or scheme. Taking the record in a light most favorable to the prosecution, assuming but not conceding, that the petitioner participated in the illegal sale of cocaine to Andino, his explicit refusal to deal with anyone else eliminated his membership in the confederation or agreement which is the very essence of the conspiracy.

In the case of *U.S. v. Murray*, 527 F.2d 401 (C.A. Tex. 1967), the defendants discussed sales of drugs with federal agents, sold drugs to federal agents, and met with said agents and promised to supply additional drugs. The court in *Murray* found:

> "Mere presence or association is not enough, for it to establish a person's participation in a conspiracy."

There may have been a conspiracy between Andino, DeMarsico, Mancini and Pavone to deal in cocaine, but the appellant *affirmatively refused to become a part of it.* It necessarily follows therefore, that in line with *Kotteacos, supra, Borelli, supra, and Murray, supra,* that the mere association with one participant in a conspiracy without the petitioner having joined the conspiracy, without having a stake in the success of the venture is insufficient to sustain conviction of the petitioner for conspiracy. *U.S. v. Di Re,* 159 F.2d 818 (2d Cir. 1947).

Following the logic that the petitioner could not have been convicted of the conspiracy count, we must now turn

to the validity of the conviction for possession with intent to sell cocaine, and the sale of cocaine. The government relied on the theory of *Pinkerton v. U.S.*, 328 U.S. 640 (1946), that proof of a conspiracy is sufficient to establish proof of possession, and sale of the drug involved in the conspiracy. As the petitioner could not have been convicted of conspiracy, then we are left with a trial record which is devoid of the corpus delecti (the concaine), and which is sustained solely upon the uncorroborated testimony of an admitted perjurer-accomplice, whose words alone are the only evidence against the petitioner, other than the statement by another accomplice, DeMarsico, that he was present when accomplice Andino met with the petitioner and spoke to him in Spanish. Where there is no evidence against the petitioner, except the co-conspirators' declarations against him, the petitioner must be acquitted. *U.S. v. Renda*, 56 F.2d 601, 602 (2d Cir. 1952). In a more recent case, it was held that even though the uncorroborated testimony of an accomplice may be sufficient to convict, where the witnesses' qualifications are so shoddy, a verdict of acquittal should be directed. *Suhl v. U.S.*, 390 F.2d 547 (C.A. 9, 1968), cert. den. 391 U.S. 964, 88 S.Ct. 2035. In the instant case, the main witness against the petitioner was given total immunity from prosecution upon the trial of the petitioner and admitted he was the instigator of the crime, and further that he committed perjury in a state case for possession of cocaine by falsely placing ownership of the cocaine, in that case, upon another person (R.P. 4,28-242).

The evidence discloses that the petitioner *refused to join the common plan or scheme*, and therefore, refused to become a co-conspirator. Therefore, his conviction on the conspiracy count in the indictment should be reversed. There being no further proof of illegal activity against the petitioner other than the uncorroborated testimony of a self-admitted perjurer-accomplice, the proof is insufficient as a matter of law to sustain the conviction for criminal sale

of cocaine, and criminal possession of cocaine with intent to sell, and the convictions thereon should also be reversed.

Finally, it must be noted that the illegal transactions between Andino and the petitioner *all allegedly took place in the City and State of New York* and, therefore, the U. S. District Court of New Jersey had *no jurisdiction* with respect to counts two and three, possession of cocaine and distribution of cocaine, and the convictions should be reversed.

Directly on point with petitioner's contention that the Court had no jurisdiction to try him, since it was not alleged that he took part in any legal transactions within the District of New Jersey, is the case of *U.S. v. Mancino*, 179 F.Supp. 897 (1960 S.D.N.Y.). In *Mancino, supra*, all illegal transactions involving drugs took place within the Eastern District of New York, and the defendant was prosecuted within the Southern District of New York. The defendant moved for a judgment of acquittal upon the grounds that the court lacked jurisdiction to try the case, since the transactions took place outside of the Southern District of New York. The court in granting Mancino's motion stated:

> "Proving proper venue is part of the Government's case, without which there can be no conviction."

The court cited *U.S. v. Bryson*, (1954) D.C.N.D. Cal.), 16 FRD 431, and *Post v. U.S.* (1894), 161 U.S. 583, 16 S.Ct. 611, in support of its granting petitioner's motion for a judgment of acquittal. The government failed to prove that the petitioner participated in any illegal acts within the District of New Jersey, therefore, the government failed to prove that the court had venue or jurisdiction over the petitioner and the judgment s ould therefore be reversed.

Was the Petitioner Deprived of His Constitutional Right to a Fair Trial?

A. Was the petitioner denied to a fair trial by virtue of the Judge's reference to him as "*convict*" during the Judge's charge to the jury?

When the trial judge during his charge to the jury referred to the petitioner and his co-defendant as "convicts", he suggested to the jury that the petitioner was guilty of the crimes charged, and influenced said jury in returning its verdict of guilty against the petitioner. This remark by the trial judge deprived the petitioner of his constitutional rights to a fair trial and due process of law.

Before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. Calif.*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d, 705.

> ". . . There are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless errors." *Ibid.* 87 S.Ct. at 827.

Chapman then meant *no compromise with the proposition that a conviction cannot be based to any extent on constitutional error.*

In the case at bar, the sole evidence against the petitioner was the uncorroborated testimony of two alleged accomplices. The first witness was Alexjandro Andino, who testified that he made contact with the petitioner for the purpose of purchasing cocaine for the witness DeMarsico who, in turn, would distribute such cocaine to its ultimate users. (R.P. 37). Andino admitted on the witness stand that he had, in fact, committed perjury in a state trial wherein he was charged with possession of cocaine in that he placed the ownership of the cocaine in his New Jersey State case to a third person thereby wrongfully exculpating himself. (R.P. 4,28-4,42). As a result of perjury, Andino was

acquitted of the state possession charges, (R.P. 4,54-55). Andino received immunity from prosecution for his testimony against the petitioner herein. (R.P. 1,27). The second witness was accomplice Arthur DeMarsico, who testified that he had gone from New Jersey to the Bronx to a bar where he met the petitioner. (R.P. 3,10). DeMarsico stated that his only direct connection with the petitioner was to have deen introduced to him. (R.P. 3,90). He never saw the petitioner possess or distribute cocaine but was advised by Andino, that the latter had received cocaine from the petitioner. (R.P. 3,72).

Arthur DeMarsico, in consideration of his testimony, received a three-year *suspended* sentence, three years special parole and a fine of $500. In addition, his wife, Cynthia Beggs, was allowed to plead guilty to a misdemeanor, possession of cocaine, and received a suspended sentence therefor. (R.P. 3,68 and appendix).

A reading of the record indicates that the evidence at best bore great scrutiny as each of the witnesses against the petitioner received substantial consideration for his testimony and that said testimony was fraught with inconsistency and uncertainty. Thus, although there may have been sufficient evidence to establish the petitioner's participation in the crimes charged, ajury might still have concluded that the case was not proved beyond a reasonable doubt. Certainly, the *government must now carry its burden of demonstrating beyond a reasonable doubt that the judge, in his charge to the jury, referring to the petitioner as a convict, did not contribute to the petitioner's conviction.* Although the government may argue that the evidence is legally sufficient to sustain the verdict of guilt, it was not so overwhelming that it can be said that as a matter of law, the judge's prejudicial statement could not have influenced the verdict. *Chapman v. Calif., supra.* Emotions aside, the failure to afford an accused a fair hearing violates even the minimum standard

of due process regardless of the heinousness of the crime charged (*see Irvin v. Dowd*, 336 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751).

> "No one would dispute the statement that a defendant in a criminal case has a constitutional right to be proven guilty beyond a reasonable doubt before he is deprived of his life, liberty or property (U.S. Const., 5th Amdt., Section 1; N.Y. Const., Art. 1; *In re Winship*, 397 U.S. 358, 363-364, 90 S.Ct. 1068, 25 L.Ed. 2d 368; *LaFave & Scott, Criminal Law, Hornbook Series*, pp. 45-46; *cf. Matter of Richard S.*, 27 N.Y.2d 802, 315 N.Y.S.2d 861, 264 N.E.2d 353; *see* CPL 70.20). Unless an appellate court can say that errors committed at trial, which affected defendant's substantial rights, are harmless beyond a reasonable doubt, defendant's right to that standard of proof can be severely prejudiced, the extent of the prejudice depending upon the nature of the error in the context of other proof and the circumstances of the case." *People v. Crimmins*, 367 N.Y.S.2d 213.

> "In jury trials, the trial judge should be cautious and circumspect in his language and conduct before the jury . . . especially, he should refrain from any remarks that are calculated in any way to influence the minds of the jurors or to prejudice a litigant. Improper remarks which are prejudicial *or have a tendency to prejudice the minds of the jurors* against the unsuccessful party afford grounds for a new trial or reversal of judgment." 5 A.L.R.3d 976. (Emphasis supplied).

The judge's characertization of the petitioner as a "*convict*" during the charge to the jury was prejudicial in that it interfered with the jury's function as finders of fact

and therefore deprived the petitioner of his constitutional right to a fair trial. The judgment should be reversed and a new trial ordered.

B. Was the Judge's curative instructions sufficient to eliminate prejudice against the petitioner from the jury's mind?

The reviewing Court in its experience must be cognizant of the power and impact of statements contained in a trial judge's charge to the jury. The laymen sitting as jurors at the beginning of the trial are sworn to apply the law as the Court gives it to them without hesitation and without injecting their personal views as to what the law should or should not be. During the trial judge's charge to the jury, eyes and ears of the jurors are focused upon the judge whose very words, at that instant, are sufficient to influence the outcome of the trial.

In this case, the judge had given his own "boiler plate" charge to the jury, and without comment, included in his charge those requests to charge which the irosecution had made and which the Court had granted. In a sudden shift of tactics, the Court chose to inform the jury that the petitioner, in fact, made requests to charge which he granted, thus, giving emphasis at that point to the fact that the charges which he was then delivering were not the Court's own creation, but those which the petitioner had requested and which he granted.

It is respectfully submitted that the mere emphasis by the judge that he had granted petitioner's requests to charge may have caused a certain reluctance in the jurors' minds to vote for acquittal because it was the petitioner's request to have the jury consider the case in light of those charges. When the trial judge then stated:

"Now I refer to the *convicts'* request number 3". (Emphasis added) (R.P. 5,90).

the jury may reasonably have concluded that the judge decided that the petitioner was guilty of the crime and that the jury should, in fact, convict the petitioner. After the charge to the jury was completed, petitioner pointed out to the Court that the error had, in fact, taken place and that the Court referred to the petitioner as a "convict" (R.P. 5,96). The only curative instructions were:

> "THE COURT: Let me correct something. I understand that I used the word 'convicts' in my instructions to you. Please disregard that entirely. That has no place in this case at all, and no inference against either one or both of these defendants is to be drawn by virtue of that. The Court committed an error. I apologize for that."

This instruction was insufficient to erase from the jury's mind that the indication by the Court that the petitioner was a "convict" or should be convicted and the government must prove beyond a reasonable doubt that the judge's reference to the petitioner as a "convict" did not affect the jury's verdict in convicting the petitioner.

It is respectfully urged that rather than curing the prejudicial error, the judge's instruction gave emphasis to the word "convict" at a crucial point in the trial and may have been the most influential factor in the jury's Reaching its verdict.

> "Cautionary instructions do not cure a comment 'of a sort most likely to remain firmly lodged in the memory of the jury and to excite a prejudice which would preclude a fair and dispassionate consideration of the evidence,' Quercia v. U.S., 289 U.S. 466, 472, 53 S.Ct. 698, 700, 77 L.Ed. 1231 (1933)".

Another inference may be reasonably drawn from the circumstances. In the case at bar, the petitioner chose not to take the witness stand on his own behalf as the Court

well knows is his constitutional right. The jury may have concluded that when the Court referred to the petitioner as a "convict", the reason the petitioner did not take the stand on his own behalf was because he had been previously convicted of a crime and did not want to allow the jury to hear inquiries with respect to his previous criminal record. This very thought entering the jury's mind would have entered into their deliverations and most probably operated to the detriment of the defendant. The judge's characterization of the petitioner as a "convict" is of a "sort most likely to remain firmly lodged in the memory of the jury, and to excite or prejudice it precluding a fair and dispassionate consideration of the evidence", Quercia v. U.S., 106 Fed. 892, 895; Wallace v. U.S., 291 Fed. 972; Leslie v. U.S., 43 F.2d 288, 289.

In the instant matter where the conviction was based upon the uncorroborated testimony of accomplices, one of whom was a self-admitted perjurer, and where there was no independent evidence of drugs introduced at the trial, it must be said that the record is not overwhelmingly indicative of guilt. It is not unreasonable to state after a review of the entire record that at the time the judge was instructing the jury, the guilt or innocence of the petitioner was a question which was not easily resolvable in the jury's mind.

> "In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. Then error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial, since there is a real chance that it might have provided the slight impetus which swung the scales toward guilt." Glaser v. U.S., 315 U.S. 60 (1942), at p.67.

In the Third Circuit, in a case nearly paralleling the case at bar, the trial judge in an income tax evasion case stated:

> "The people of this State and of the United States are entitled to be assured of this conviction."

This Court in reversing the conviction treated the judge's statement as an expression of his opinion that the accused was guilty and that the comment was prejudicial to the accused. U.S. v. Link, 202 F.2d 592 (C.A.3-1953). Also see Bihn v. U.S., 328 U.S. 633, 66 S.Ct. 1162.

The highest court in New York State, the Court of Appeals, in considering the weight to be given cautionary or curative instructions stated:

> "Such instructions are easy to give, but hard to follow." People v. Marshall, 306 N.Y. 223 (1954), 117 N.E.2d 265.

To the same effect, Judge Learned Hand wrote in Nash v. U.S., 54 F.2d 1006, 1007:

> "In effect, however, the rule probably furthers, rather than impedes, the search for truth, and this perhaps excuses the device which satisfies form while it violates substance; that is, the recommendation to the jury of a mental gymnastic which is beyond, not only their powers, but anybody else's."

The petitioner's right to a fair trial having been denied, the judgment should be reversed and a new trial ordered.

Was the Manner in Which Petitioner Was Sentenced A Denial of Due Process and Equal Protection Under the Law?

While it is customarily stated that an appellate court has no right to exercise a general review of sentencing, the Court of Appeals has authority to vacate and correct sentences imposed in violation of the petitioner's constitutional rights to due process and equal protection under the law. *Dorszynski v. U.S.*, 418 U.S. 424, 94 S.Ct. 3042. From the record, this Honorable Court can see that the petitioner was the recipient of a sentence which was so far in excess of the sentences meted out upon the other persons indicted with the petitioner that said sentence is violative of petitioner's constitutional rights to due process and equal protection under the law.

A. Where petitioner's sentence exceeded his co-defendant's on the basis of sex discrimination, has the petitioner been denied due process and equal protection under the law?

Indictment number 76-444 charged seven (7) people with the following violations of the Federal Law:

(a) Conspiracy to possess and distribute cocaine;
(b) Possession with intent to distribute cocaine; and
(c) Distribution of cocaine.

Only the petitioner and his wife, Rosa Rodriguez, chose to exercise their constitutional rights to a trial by jury. After trial, the petitioner was found guilty on all counts and his wife, Rosa Rodriguez, was found guilty solely on the conspiracy count.

On the conspiracy count, petitioner's wife was sen-

tenced to three (3, years in prison, plus three (3) years special parole, while the petitioner, upon being found guilty of the same charge was sentenced thereon to 15 years in prison, plus three (3) years special parole. Absent any statement in the record which would justify this great disparity in sentencing, it must be concluded that the petitioner suffered a far greater sentence *solely because he was a male.* The Court of Appeals for the Fourth Circuit dealt with sex discrimination, stating:

> "Under current law, and absent any proof that rehabilitation or deterrence are more easily accomplished in the case of a female than male, we deem the factor of sex an impermissible one to justify a disparity of sentence." *U.S. v. Maples,* 501 F.2d 985 (1974).

In that case, the defendant Maples was a 21 year old male who was indicted along with a 17 year old female co-defendant and one other male defendant for robbery. Both Maples and the *female* co-defendant pleaded guilty. The female received a 10-year sentence, while Maples received a 15-year sentence. The Court of Appeals vacated the sentence and remanded the matter back to the District Court, stating:

> "The object of the resentence will, of course, be to eliminate from Maples' term the portion of its length attributable to the fact that Maples is a male." (p. 987).

The Supreme Court in the leading case of *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764 (1973), considered sex discrimination as it related to military benefits. The Court stated:

". . . a difference in sex alone may not be used to justify disparate sentence for the same crime committed under the same circumstances." (p. 1235).

Absent any specific statement as to why the judge chose to discriminate against the petitioner by adding 12 more years to his sentence over that meted out to petitioner's wife who was similarly convicted, this Court must conclude that such disparity of sentence was based upon the sex of the petitioner alone and, therefore, violative of the petitioner's rights to due process and equal protection under the law. Accordingly, the sentence should be vacated and the matter remanded back to the District Court consistent with the holdings in *U.S. v. Maples* and *Hall v. McKenzie*.

B. Where the petitioner chose to exercise his right to trial by jury and was found guilty of a conspiracy count and received a maximum sentence thereon, was he denied due process and equal protection under the law where the co-defendants who pleaded guilty received suspended jail sentences?

The government cannot argue that the alleged conspiracy herein was the creation of the petitioner, rather, the prime movers in the alleged conspiracy were Andino, DeMarsico, Mancini and Pavone. Andino received immunity from prosecution and DeMarsico was allowed to plead guilty to the conspiracy part of the indictment and received a suspended sentence, a small fine, three (3) years on probation, and three (3) years on special parole. Glen Mancini pleaded guilty to the conspiracy count and also received a three-year suspended sentence, three (3) years on probation, three (3) years on special parole, and a fine of $500.00. Michael Pavone also pleaded guilty to count one of the indictment and received the same exact sentence as DeMarisco and Mancini. Cynthia Beggs, DeMarsico's wife, was allowed to plead guilty to a misdemeanor and also received no term of imprisonment.

It is apparent that the petitioner herein is being

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crucified solely because he exercised his constitutional rights to a trial by jury. Thus, the imposition of a cumulative term of twenty (20) years of imprisonment imposed upon the petitioner *for exercising his right to a jury trial* is so disproportionate that it is shocking to one's sense of fairness in one instance and violative of the equal protection clause of the United States Constitution as well.

The Supreme Court of the United States, in the case of *Yick Wo v. Hopkins*, 118 U.S. 356, 373-374, 6 S.Ct. 1064, 30 L.Ed. 220, stated:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and *unequal hand* so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution."

Judge Learned Hand, in the case of *East Coast Lumber Terminal v. Town of Babylon* (2nd Circuit), 174 F.2d 106, 112, 8 A.L.R.2d 1219, citing *Yick Wo, supra*, stated:

> "It has indeed been the law for over 60 years that the (14th) amendment covers the uneuall enforcement of valid laws, as well as any enforcement of invalid laws."

It is petitioner's contention that the record does not justify his being singled out of a group of seven (7) people to be the recipient of a cumulative 20-year sentence, when four (4) other persons who conceived of the conspiracy and carried it out with the petitioner's knowledge, who pleaded received suspended sentences, and the other co-defendant who was convicted of conspiracy on the trial received a three (3) year sentence on a charge for which the petitioner received a 15-year sentence.

The Supreme Court, in the case of *Townsend v. Burke*, 334 U.S. 736, 68 S.Ct. 1252, recognized an appellate court's right to review a sentence, stating:

> "An appellate court may scrutinize the sentencing process to insure that the trial judge has based his decision on reliable information."

More pertinent to the case at bar is the case of *U.S. v. Wiley*, 278 F.2d 500 (C.A. 7 1960), wherein the Court of Appeals set aside a term of three (3) years of imprisonment imposed upon a minor defendant who was an accessory to a crime, had no prior record, but who had been found guilty upon trial, whereas a co-defendant, regarded as a ringleader who had four (4) prior felony convictions, *but pleaded guilty*, received only two (2) years imprisonment. The Court in *Wiley* stated:

> "Where the facts appearing in the record point convincingly to the conclusion that the District Court has, without any justification, arbitrarily singled out a . . . defendant for the imposition of a more severe sentence than that imposed upon the co-defendants, this court will not hesitate to correct the disparity. In doing so, it is exercising its supervisory control of the District Court in aid of its appellate jurisdiction."

In the case of *U.S. v. Daniels*, 446 F.2d 967 (C.A. 6 1971), the Court of Appeals held at page 969:

> "The process of sentencing an offender, however, is not wholly immune from judicial review solely because the sentence imposed upon the offender falls somewhere within the statutory limits." *Williams v. Oklahoma*, 358 U.S. 576, 79 S.Ct. 421 (1959); *Townsend v. Burke, supra*; *Scott v. U.S.*, 135 U.S. App. D.C. 377, 419 F.2d 264, 266-7 (1969).

There is no questior but that the sentence imposed upon the petitioner falls within the statutory limits, however, where the senter ce is in such great disparity with the sentence imposed upon the co-defendants in the case and there is an absence in the record to show justification for such divergent sentences, the petitioner has been deprived of his rights to due process and equal protection under the law, and the sentence should be vacated and the matter remanded back to the District Court for resentencing.

C. Petitioner's sentence is disproportionately greater than those of persons sentenced for the commission of the same crime

In the Addendum annexed hereto is the Drug Enforcement Administration's Survey of the Court Disposition of defendants for the period of January 1977 through June 1977. A reading of the survey indicates that in the District Courts of New York and Northern New Jersey, the average sentence for conspiracy involving cocaine is 44 months; average sentence for possession of cocaine is 35.3 months; and the average sentence for delivery (sale) is 33 months. The report further indicates that throughout the United States for the same period, the average sentence for persons convicted of conspiracy involving cocaine is 32.9 months; the average sentence for possession of cocaine is 43.1 months; and the average sentence for delivery (sale) is 43.8 months. The sentence of 20 years which the petitioner received, and it being noted that the petitioner had no prior felony convictions in any court, federal or state, was so far in excess of the average as to shock oen's sensibility and to be glaringly illustrative of a denial of equal protection under the law.

The case of *U.S. v. Walker*, 469 F.2d 1337 (C.A. 1 1972), *cert. denied* 410 U.S. 989, 93 S.Ct. 1501, is

illustrative of the proper way of dealing with a sentence which is more severe than sentences meted out upon other persons similarly convicted. In *Walker, supra*, the appellant was convicted of violations of the Selective Service Act and given two (2) years in jail which was within the statutory provisions, but more severe than the penalties imposed in contemporaneous Massachusetts draft cases. The court stated (469 F.2d 1337, at p. 1338):

> "We are not oblivious to the serious attention being devoted to any aspects of the sentencing process, including sentence review. See, e.g., American Bar Association Project on Standards for Criminal Justice, Appellate Review of Sentencing (Approved Draft 1968); Working Papers of the National Commission on Reform of Federal Criminal Laws, Volume II, Page 134-135 (1970). And even in the absence of legislation or broadly accepted policy, we have set aside sentences where impropriety has clearly appeared."

Clearly, the record is devoid of any justification for imposing suspended sentences on the prime actors charged in the indictment merely because they pleaded guilty and then imposing the maximum sentence on the petitioner simply because he exercised his constitutional rights to have a trial by jury. The Court should vacate the sentence and remand the matter back to the District Court for resentencing.

D. Is the sentence of the petitioner illegal in violation of 21 U.S.C. Section 841(a)(1)(b)?

Title 21 U.S.C., Section 841(a)(1)(B), provides that, "In the case of a controlled substance in scheduled I or II which is not a narcotic drug . . . such person shall be sentenced to a term of imprisonment of not more than 5

years . . ." The subject matter of the indictment and the proof on the trial relates solely to cocaine which is not a narcotic drug.

The petitioner respectfully contends that cocaine is not a narcotic drug, and therefore, a sentence of 15 years imprisonment with respect to illegal acts concerning cocaine is excessive and illegal.

The term narcotic is derived from the word narcosis, or in the original Greek, Narkitikon, which means numbness or sleep. Any drug which produces sleep or drowsiness, has traditionally been defined as a narcotic. Drugs stemming from the opiate family, especially opium, morphine, heroin, and a variety of synthetic drugs which act as a depressant upon the central nervous system are narcotic drugs. In terms of effects, narcotics such as the opiates are generally addictive, running rapidly to tolerances, and causing severe physical withdrawal symptoms upon termination.

Cocaine on the other hand, does not resemble the opiates in any pharmacological sense, but is universally identified with amphetamines. Far from being a depressant, cocaine is generally considered as an anti-fatigue, anti-soporific stimulant often used to stimulate alertness or euphoria. Its effects upon respiration, the central nervous system, and the gastro-intestinal tract, are different from those of narcotics. Cocaine is not addictive, but may be habituating as much as marijuana, cigarette smoking, etc. Heavy users do not build up tolerances requiring greater dosages or more frequent usage. Nor does termination appear to cause withdrawal symptoms, although some older pharmacological texts and government affiants suggest possible psychological dependence stemming from the so-called cocaine psychosis with fornication and paranoia in addition to depression.

Even though the available body of knowledge will not permit us to draw conclusions as to the impact of cocaine

on a person's health, it is clear that the effects are vastly different from those generally associated with true narcotics. Based on the foregoing, it is clear, from a medical standpoint, that Congress has erroneously classified cocaine with heroin and other opiates for penalty purpose.

According to the White Paper on Drug Abuse published in September 1975, by the White House Domestic Council Drug Abuse Task Force headed by then Vice President Rockefeller, certain findings with respect to cocaine were made. To paraphrase the report, the findings were as follows:

(1) Cocaine is a mild stimulant, and is not a narcotic;

(2) Cocaine as a mild stimulant is in the same family with caffeine, nicotine, and the amphetamines;

(3) Abuse of cocaine in this country is an extremely rare phenomenon. Overdoses reported in the literature have been primarily the result of medical misuse of the drug;

(4) Overdoses of cocaine in social use are so rare that it is nearly impossible to document even a single death from voluntary social use;

(5) Heroin users rarely use cocaine, and the trafficking patterns for the two drugs are unrelated;

(6) Cocaine has great potential medical use for treating depression;

(7) The predominant pattern of cocaine use in the United States involves no criminality;

(8) There is no evidence of any significant social, physical, or psychological harm that has come from the current use of cocaine by millions of persons of India and South America;

(9) Although both are stimulants, cocaine and

the amphetamines, and since the liver of the human body handles cocaine extremely efficiently lethal dosage of cocaine is detoxified by the liver in one hour;

(10) No tolerance is developed with cocaine use; in fact there is some evidence that reverse tolerance occurs, and therefore there are no withdrawal symptoms associated with cocaine use;

(11) There is very little, if any, intoxication associated with cocaine use. In fact, cocaine seems to accentuate normal feelings of energy and wakefulness while slightly depressing hunger.

Because the criminal classification of cocaine as a narcotic is without a sufficient rational basis, a conviction under the statutes incorporating this classification would deprive the defendant of liberty without due process of law. All three counts of the indictment charging defendant Rodriguez must therefore be dismissed.[1]

When Congress first classified cocaine as a "narcotic" for criminal purposes, it relied on certain supposed "facts" and attitudes commonly believed in that era. This original classification has been carried forward to the present law without critical examination or review, and no present credible factual justification can be advanced to support it. The defendants do not challenge this classification simply because hereoin and cocaine are grouped together for penalty purposes.[2] Certainly, Congress may decree that

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1. Conspiracy to commit the offense charged is punishable by the same penalties prescribed for the substantive offense itself, 21 U.S C. Section 846.

2. Thus, this case differs markedly from the many cases attacking the very criminalization of marijuana based on its inaccurate classification as a "narcotic." *See, e.g., English v. Virginia Probation and Parole Board*, 481 F.2d 188 (4th Cir. 1973); *United States v. Kiffer*, 477 F.2d 349 (2d Cir.)., *cert. denied*, 414 U.S. 831 (1973); *Rener v. Beto*; 447 F.2d 20 (5th Cir.

different or even dissimilar crimes may be punished alike. But the classification must be rational and not arbitrary. Where the reasonableness of the classification cannot be supported *in fact*, as here, the statute must fall. *United States v. Smaldone*, 484 F.2d 311, 320 (10th Cir. 1973); cf. *Police Dept. of Chicago v. Mosley*, 408 U.S. 92 (1972).

Cocaine is utterly unlike the true narcotics or opiates. Yet non of these differences was considered by Congress when it defined cocaine as a narcotic under the Harrison Act, nor were they considered in the enactment of the criminal statutes now in force.

When Congress legislates in reliance on supposed facts which subsequently are revealed to be incorrect, the law which necessarily depends on those facts is unconstitutional. In *Turner v. United States*, 396 U.S. 398, 418-19 (1970), the Supreme Court reversed a conviction for possession of cocaine under the law superseded by the one in question here. "Based on our own examination of the facts now before us," the Court said, the Congressional determination that all cocaine could be presumed imported, on which the convictions depended, was "more-likely-than-not" incorrect. *Id.* at 419.

Even if the necessary underlying facts are true when the legislation was passed, but subsequently became untrue, the convictions must be overturned. In *Leary v. United States*, 395 U.S. 6 (1969), the Court reversed a conviction for transportation of illegally imported marijuana. In *Leary* Congress had legislated a presumption of knowledge of importation based on "facts" once valid, but not longer true at the time of trial. The Court declared:

1971), *cert. denied*, 405 U.S. 1051 (1972). At least two state supreme courts, however, have invalidated marijuana statutes in part because of its irrational classification as a "narcotic," *People v. Sinclair*, 387 Mich. 91, 194 N.W. 2d 878 (1972); *People v. McCabe*, 49 Ill. 2d 338, 275 N.E. 2d 407 (1971).

"We have considered more recent information in order both to obtain a broader general background and to ascertain whether the intervening year have witnessed significant changes which might bear upon the presumption's validity.

> (Fn.) A statute based upon a legislative declaration of facts is subject to constitutional attack on the ground that the facts no longer exist; in ruling upon such a challenge a court must, of course, be free to re-examine the factual declarations."

Id. at 38, n. 68. See also, *Abie State Bank v. Bryan*, 282 U.S. 765, 772 (1921); *cf. Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954). As shown by the legislative history discussed above, Congressional error in the original and unchanged penal classification of cocaine was not limited to the realm of science. Another element was racial myth and fear founded on exaggerated or untrue accounts of violent crimes committed against white women by drug-crazed black men. Although racially neutral on its face, the law was partly designed for discriminatory application, condemned by the Fifth Amendment. *Cf. Loving v. Virginia*, 388 U.S. 1 (1967); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). Even where the law might otherwise be valid, a demonstrably invidious legislative intent will militate against the law's validity. *See United States Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973). Racially-motivated differences in penalty provisions cannot be tolerated. *Cf. Furman v. Georgia*, 408 U.S. 238, 242-57 (Douglas, J., concurring, 364-66) (Marshall, J., concurring) (1972).

Although Congress carefully, thoroughly and commendably reorganized the controlled substances law in

1970, it did not reexamine or reform the criminal classification of cocaine at that time or at any other time. No present rationale supports the classification of the cocaine user with the hard core narcotic addict. Because the classification of cocaine as a "narcotic drug" is arbitrary, and discriminates against the defendants invidiously and without a rational basis in fact, the defendants' indictment based upon the classification must be dismissed.

The misclassification of cocaine violates due process in yet another fashion: by penalizing offenses involving cocaine, a stimulant, more harshly than correlative offenses involving other stimulants, the present statutory scheme violates the guarantee of equal protection of the laws.

This guarantee is an essential element of Fifth Amendment due process of law. *Schneider v. Rush*, 377 U.S. 163, 168 (1964); *Bolling v. Sharpe*, 347 U.S. 497 (1954). Equal protection of the law requires that no different punishment may be imposed of one offender than is statutorily available for imposition on all similarly situated. See, e.g., *Skinner v. Oklahoma*, 316 U.S. 535, (1942); *Hodgson v. Vermont*, 168 U.S. 262, 273 (1897); *Barbier v. Connolly*, 113 U.S. 27, 31 (1885;. In the leading case of *Skinner v. Oklahoma, supra*, the Court invalidated a statute requiring the penalty of sterilization for some convicts but not for others similarly situated, relying heavily on its analysis on the threat to the fundamental right to procreate. In the instant case, a fundamental right is also threatened: liberty from physical penal coercion for a possible ten years in excess of the punishment term faced by members of the favored class, amphetamine users.

The Supreme Court has recognized that this right is not merely "fundamental", it is *primary*: "Although the Court has not assumed to define liberty, that term is not confined to mere freedom from bodily restraint." *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954). Furthermore, where

rights involved in the criminal process are involved, classifications not otherwise "suspect" are nevertheless treated as such. See, e.g., *Griffin v. Illinois*, 351 U.S. 12 (1956) (criminal process; poverty); *In re Gault*, 387 U.S. 1 (1967) (criminal process; age). For these reasons, this discriminatory classification of cocaine and its distributors compared to other controlled stimulants and their distributors must be carefully scrutinized: "There are limits to the extent to which the presumption of constitutionality can be pressed, especially where the liberty of the person is concerned." *Skinner v. Oklahoma, supra*, at 544 (Stone, C.F., concurring).

The discrimination cannot survive such scrutiny. There is no compelling justification for treating alleged cocaine distributors differently from alleged amphetamine distributors. Cocaine is, if anything, less dangerous to the user and to his or her community. Its use is necessarily less widespread, because it is legitimately manufactured in far lesser quantities and so is not often diverted to illicit use from legitimate channels, as are the amphetamines. It is no more psychologically addictive than methedrine and has no greater a potential for abuse. The deterrent effect, if any, of an additional ten year penalty cannot be justified.

Even under the less stringent test of "minimum rationality" followed in challenges to the constitutionality of commercial regulations, the discrimination against cocaine users cannot be upheld. By placing cocaine in Schedule II rather than in Schedule I, Congress has recognized its analogy with methedrine (and difference from heroin) in important respects. By penalizing methedrine offenses together with those involving Schedule III substances, Congress recognized that control of all the stimulants involves essentially similar factors. The differential penalty scheme that selectively removes cocaine from the punishment otherwise applicable, 21 U.S.C. §841(b)(1)(B), is arbitrary and irrational. It punishes like

offenders differently without justification. To apply the classification would deprive the defendants of their liberty without due process of law.

The second alternative relief urged by defendant in this case is particularly appropriate to remedy this constitutional violation. If the Court were to require the instant offenses to be punishable under 21 U.S.C. §841(b)(1)(B) with the other stimulants in Schedule II, rather than under §841(b)(1)(A), defendant would be in precisely the same position vis a vis his potential penalty, as an individual charged with distribution and conspiracy to distribute any other stimulant.

Finally, imposition of a penalty of fifteen years imprisonment for the offenses charged constitutes cruel and unusual punishment in violation of the Eighth Amendment. The Eighth Amendment limits both the amount and the nature of permissible punishment, invalidating a punishment which "is excessive and serves no valid legislative purpose." *Furman v. Georgia*, 408 U.S. 238, 331 (1973).

A punishment may be cruel in its disproportionality in comparison to punishments inflicted for similar crimes. *Weems v. United States*, 217 U.S. 349 (1910). In the case at bar, classification of cocaine as a narcotic has exposed defendant to a punishment of awesome disproportionality. On the basis of a legislative mistake of fact, defendant's potential penalty for each offense is now 15 years, as opposed to the five years he would have faced had cocaine been properly classed as a stimulant.

To spend 20 years in prison for a crime which has been erroneously defined would indeed be cruel and unusual, but defendant now faces this reality; indeed, he is serving twenty years in prison since the penalties for two out of three convictions were imposed consecutively.

CONCLUSION

The questions presented by this case are a great and recurring significance in the administration of justice as it applies to defendants in criminal cases, genuinely and specifically to those who have been charged with violations of drug laws involving cocaine. The serious questions of criminal justice and public policy involved herein and the effect of the decision below, if not reversed, upon the historic responsibility of the courts to provide fair and equal justice under the law, make this case a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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Harvey J. Michelman
Of Counsel

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Office of the

NOTICE OF ENTRY

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
Office of the Clerk

NEWARK 07102

UNITED STATES OF AMERICA

-vs-

RAMON RODRIGUEZ

Cr. 76-444

There was entered on the docket on Feb. 2, 1978 aa certified copy of Judgment Order of U.S.C.A. in lieu of mandate affirming Judgment of the District Court.

ANGELO W. LOCASCIO, Clerk

cc: U.S. Attorney
U.S. Probation
U.S. Marshal
Michelman & Michelman, Esqs.

JUDGMENT ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 77-1515

UNITED STATES OF AMERICA

vs.

RODRIGUEZ, RAMON
RAMON RODRIGUEZ, a/k/a RAMIN,
Appellant.

(D.C. Crim. No. 76-444-1)

On Appeal from the United States District Court
For the District of New Jersey

Submitted Under Third Circuit Rule 12(6)
January 6, 1978

Before GIBBONS, GARTH, *Circuit Judges*, and WEINER,* *District Judge*

Jonathan L. Goldstein, United States Attorney
Ralph A. Jacobs, Assistant United States Attorney
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Attorney for Appellee

Harvey J. Michelman, Esquire, Jerry DeLuise, Esquire
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Attorneys for appellant

***Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.**

JUDGMENT ORDER

In this appeal from a judgment of sentence for violation of 21 U.S.C. §§841 and 846, defendant Ramon Rodriguez contends:

(1) that there is insufficient evidence to sustain the jury verdict;

(2) that he was deprived of due process by the court's inadvertent reference to "convicts" and that the prejudice caused by this misstatement was not dissipated by the curative instruction which was given; and

(3) that the disparate sentence imposed on him was based on sex discrimination.

We find no merit in these contentions.

It is therefore ORDERED and ADJUDGED that the judgment of the district court is affirmed.

By the Court,

s/John J. Gibbons, Circuit Judge

Attest

s/Thomas F. Quinn, Clerk

Dated: Jan. 9, 1978

Certified as a true copy and issued in lieu of a formal mandate on January 31, 1978.

Test: THOMAS F. QUINN
Clerk, United States Court of Appeals for the Third Circuit

INDICTMENT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 76-444

Title 21 U.S.C. §§841(a)(1); 846
Title 18 U.S.C. §2

UNITED STATES OF AMERICA

v.

RAMON RODRIGUEZ, a/k/a RAMIN, ROSA RODRIGUEZ, JUAN PRADO, ARTHUR DE MARSICO, CYNTHIA BEGGS, GLEN MANCINI, MICHAEL PAVONE

The Grand Jury in and for the District of New Jersey, sitting at Newark, charges:

COUNT 1

That between on or about September 1, 1975, to on or about March 1, 1976, the exact dates being unknown to the Grand Jury, at Clifton, in the District of New Jersey, and elsewhere, the defendants

RAMON RODRIGUEZ
a/k/a RAMIN
ROSA RODRIGUEZ

JUAN PRADO
ARTHUR DE MARSICO
CYNTHIA BEGGS
GLEN MANCINI
MICHAEL PAVONE

knowingly and wilfully did combine, conspire, confederate and agree with each other and with others known and unknown to the Grand Jury to knowingly possess with intent to distribute and to distribute cocaine, a Schedule II narcotic drug controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

In violation of Title 21, United States Code, Section 846.

COUNT II

That between on or about September 1, 1975, to on or about March 1, 1976, the exact dates being unknown to the Grand Jury, at Clifton, in the District of New Jersey, and elsewhere, the defendants

RAMON RODRIGUEZ
a/k/a RAMIN
ROSA RODRIGUEZ
JUAN PRADO
ARTHUR DE MARSICO
CYNTHIA BEGGS
GLEN MANCINI
MICHAEL PAVONE

did knowingly possess with intent to distribute cocaine, a Scjedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

COUNT III

That between on or about September 1, 1975, to on or about March 1, 1976, the exact dates being unknown to the Grand Jury, at Clifton, in the District of New Jersey, and elsewhere, the defendants

RAMON RODRIGUEZ
A/k/a RAMIN
ROSA RODRIGUEZ
JUAN PRADO
ARTHUR DE MARSICO
CYNTHIA BEGGS
GLEN MANCINI
MICHAEL PAVONE

did knowingly distribute cocaine, a Schedule II narcotic drug controlled substance.

In violation of Title 21, United States Code, Section 841(a)(1) and Title 18, United States Code, Section 2.

A TRUE BILL

* * * * *

DRUG ENFORCEMENT ADMINISTRATION'S SURVEY OF THE COURT DISPOSITION OF DEFENDANTS FOR THE PERIOD OF JANUARY 1977 THROUGH JUNE 1977

National
1/77 - 6/77
DEA + FF 1 X

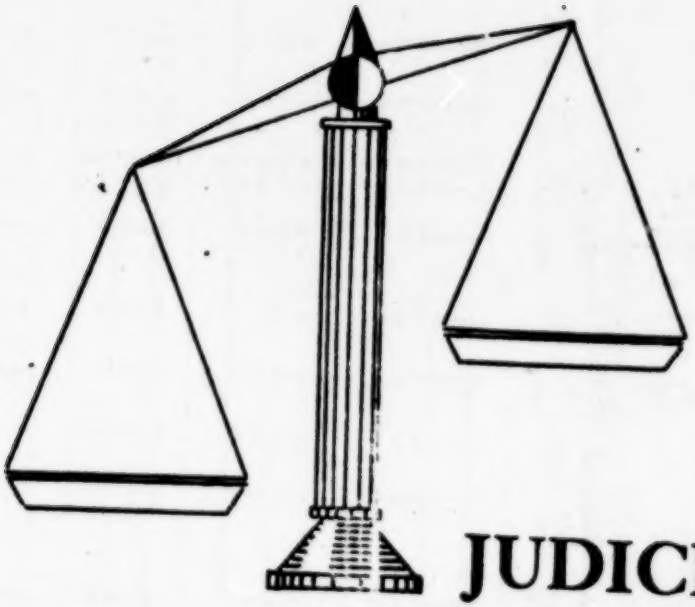
CRIMINAL STATISTICS
COURT DISPOSITION OF DEFENDANTS
PERIOD COVERED 1/77 TO 6/77
REGIONAL NATIONAL TOTAL

TYPE OF DRUG	FEDERAL COURT TOTAL DISPOSITION				FEDERAL COURT SENTENCING						STATE COURT TOTAL DISPOSITION				STATE COURT SENTENCING				
		CONV.	ACQ.	DIS.	PRISON NO.	PRISON AVG. SENT.	PRO-BATE	YCA	NARA	FINE ONLY		CONV.	ACQ.	DIS.	PRISON NO.	PRISON AVG. SENT.	PRO-BATE	IN-DEF.	FINE ONLY
NARCOTICS																			
DELIVERY	41	30	0	7	25	54.9	11	3	0	0		20	12	0	8	6	28.0	5	1	0
POSSESSION	4	4	0	0	5	17.4	2	1	0	0		8	5	0	3	2	9.0	3	0	0
CONSPIRACY	24	22	1	5	19	33.6	3	0	0	0		5	4	1	0	1	12.0	3	0	0
IMPORTATION	0	0	0	0	0	0.0	0	0	0	0		0	0	0	0	0	0.0	0	0	0
MANUFACTURE	1	1	0	0	0	0.0	0	1	0	0		0	0	0	0	0	0.0	0	0	0
OTHER	3	2	0	1	2	45.0	0	0	0	0		1	1	0	0	1	36.0	0	0	0
AVERAGE						43.9											23.4			
HEROIN BASE																			
DELIVERY	4	4	0	0	4	29.5	1	1	0	0		2	2	0	0	0	0.0	2	0	0
POSSESSION	2	1	0	1	0	0.0	1	0	0	0		2	1	0	1	0	0.0	1	0	0
CONSPIRACY	0	0	0	0	0	0.0	0	0	0	0		1	1	0	0	1	108.0	0	0	0
IMPORTATION	1	1	0	0	1	3.0	0	0	0	0		0	0	0	0	0	0.0	0	0	0
AVERAGE						24.2											108.0			
COCAINE																			
DELIVERY	234	209	4	17	133	43.9	53	23	0	0		108	94	5	9	64	54.2	28	2	0
POSSESSION	124	100	5	13	69	45.1	25	6	0	1		50	42	0	8	17	15.6	23	1	1
CONSPIRACY	83	61	5	13	48	32.9	11	2	0	0		9	7	0	2	2	18.0	5	0	0
IMPORTATION	14	13	0	1	8	27.9	3	2	0	0		0	0	0	0	0	0.0	0	0	0
AVERAGE						41.1											45.4			
POSSESSANTS																			
DELIVERY	20	15	0	5	8	37.5	7	0	0	0		11	11	0	0	6	29.5	5	0	0
POSSESSION	14	13	0	1	5	10.0	5	2	0	0		9	8	0	1	1	2.0	7	0	0
CONSPIRACY	11	10	0	1	6	30.1	2	0	0	0		1	1	0	0	1	3.0	0	0	0
IMPORTATION	1	1	0	0	0	0.0	0	0	1	0		0	0	0	0	0	0.0	0	0	0
MANUFACTURE	0	0	0	0	0	0.0	0	0	0	0		0	0	0	0	0	0.0	0	0	0
OTHER	2	1	0	1	1	24.0	0	0	0	0		0	0	0	0	0	0.0	0	0	0
AVERAGE						29.8											22.8			
LSD																			
DELIVERY	0	0	0	0	0	0.0	0	0	0	0		0	0	0	0	0	0.0	0	0	0
POSSESSION	2	2	0	0	1	12.0	1	0	0	0		0	0	0	0	0	0.0	0	0	0
CONSPIRACY	1	1	0	0	0	0.0	1	0	0	0		0	0	0	0	0	0.0	0	0	0
IMPORTATION	0	0	0	0	0	0.0	0	0	0	0		0	0	0	0	0	0.0	0	0	0
AVERAGE						12.0											0.0			

Regional
1/77-6/77 DATE
DEN+TF
1 X

TYPE OF DRUG	FEDERAL COURT TOTAL DISPOSITION				FEDERAL COURT SENTENCING					STATE COURT TOTAL DISPOSITION				STATE COURT SENTENCING				
	CONV.	ACQ.	DIS.		PRISON NO.	AVG. SENT.	PRO-BATE	YCA	FINE ONLY	CONV.	ACQ.	DIS.		PRISON NO.	AVG. SENT.	PRO-BATE	IN-DEF.	FINE ONLY
AMPHETAMINES																		
DELIVERY	4	4	0	0	0	0.0	3	1	0	0	2	1	0	1	1	12.0	0	0	0
POSSESSION	0	0	0	0	0	0.0	0	0	0	0	1	1	0	0	1	6.0	0	0	0
CONSPIRACY	3	3	0	0	2	33.0	1	0	0	0	0	0	0	0	0	0.0	0	0	0
IMPORTATION	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
MANUFACTURE	1	1	0	0	0	0.0	0	1	0	0	0	0	0	0	0	0.0	0	0	0
OTHER	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
AVERAGE						33.0										9.0			
MARIJUANA BASE																		
DELIVERY	0	0	0	0	0	0.0	0	0	0	1	1	0	0	0	0.0	1	0	0
POSSESSION	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0.0	0	0	0
CONSPIRACY	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0.0	0	0	0
IMPORTATION	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0.0	0	0	0
AVERAGE						0.0									0.0			
COCAINE																		
DELIVERY	32	27	1	4	17	33.0	1	3	0	0	54	47	5	2	35	62.0	12	0	0
POSSESSION	21	22	1	0	12	35.3	7	3	0	0	16	14	0	0	9	17.3	5	1	1
CONSPIRACY	12	9	1	8	6	44.2	2	1	0	0	3	3	0	0	2	18.0	1	0	0
IMPORTATION	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
AVERAGE						39.7										51.4			
BARBITURATES																		
DELIVERY	7	7	0	0	1	12.0	6	0	0	0	4	4	0	0	2	36.0	2	0	0
POSSESSION	2	2	0	0	0	0.0	2	0	0	0	3	3	0	0	1	2.0	2	0	0
CONSPIRACY	1	1	0	0	0	0.0	1	0	0	0	0	0	0	0	0	0.0	0	0	0
IMPORTATION	1	1	0	0	0	0.0	0	0	1	0	0	0	0	0	0	0.0	0	0	0
MANUFACTURE	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
OTHER	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
AVERAGE						12.0										24.7			
OPIUM																		
DELIVERY	3	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
POSSESSION	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
CONSPIRACY	1	1	0	0	0	0.0	1	0	0	0	0	0	0	0	0	0.0	0	0	0
IMPORTATION	0	0	0	0	0	0.0	0	0	0	0	0	0	0	0	0	0.0	0	0	0
AVERAGE						0.0										0.0			

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JUDICIAL WORKLOAD STATISTICS

JULY - DECEMBER, 1976

published by the
ADMINISTRATIVE OFFICE OF
THE UNITED STATES COURTS
WASHINGTON, D.C. 20544

Drug-Law Offense	Total defendants	Not convicted					Convicted and Sentenced				Type of Sentence									Average sentence (in months)
					Acquitted by				Convicted by		Imprisonment[1]							Probation	Fine only	Other	
		Total	U.S.A.	Dismissed	Court	Jury	Total	Plea of guilty or nolo contendere	Court	Jury	Total	Split[2] sentence	1 year and 1 day and under	Over 1 year 1 day to 3 years	3-5 years	5 years and over				
Total	10,744	2,722	5	1,749	78	240	8,061	6,324	446	1,271	5,030	285	1,018	790	1,544	1,604	2,927	57	18	47.6
Old law	321	120	-	120	-	1	92	66	6	20	82	4	11	6	20	21	30	-	-	40.8
New law	10,541	2,592	5	2,371	73	243	7,969	6,258	440	1,251	4,977	282	1,009	784	1,524	1,583	2,897	57	18	47.6
Sales, distribution, or dispensing	8,175	2,090	4	1,807	56	144	6,156	4,731	349	1,036	4,079	146	728	654	1,368	1,381	2,010	8	11	49.6
Importation	778	336	-	202	11	31	544	438	29	115	352	23	66	94	88	84	184	5	2	40.6
Manufacture	76	23	-	16	-	-	53	39	3	14	29	1	2	5	11	7	24	-	-	41.2
Possession	1,488	260	1	236	8	21	1,230	1,083	61	86	516	32	197	51	125	111	443	44	5	30.6
Records, fraudulent prescriptions	14	8	-	8	-	-	6	6	-	-	-	-	-	-	-	-	6	-	-	-
Marihuana	2,263	643	-	741	28	72	2,440	1,904	228	308	1,338	90	307	270	371	299	1,064	28	12	37.7
Old law	48	43	-	43	-	-	5	5	1	-	3	1	-	1	-	1	3	-	-	30.0
New law	2,234	600	-	698	28	72	2,434	1,899	227	308	1,323	88	307	269	371	298	1,061	28	12	37.7
Sales, distribution, or dispensing	2,170	572	-	585	28	91	1,606	1,321	169	216	97	63	258	203	253	138	644	6	6	31.2
Importation	417	104	-	90	5	9	313	233	16	64	201	17	50	51	50	29	105	1	2	32.5
Manufacture	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Possession	638	133	-	194	7	12	519	445	42	32	166	10	64	15	26	21	312	33	4	24.0
Records, fraudulent prescriptions	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Narcotics	6,004	1 516	5	1,355	41	154	4,449	3,462	106	821	3,123	96	436	412	957	1,184	1,310	12	5	57.1
Old law	273	77	-	81	-	1	96	61	5	20	20	1	11	8	20	20	37	-	-	58.5
New law	5,832	1,449	5	1,270	41	153	4,353	3,401	101	801	3,083	95	425	404	937	1,164	1,273	12	5	57.2
Sales, distribution, or dispensing	4,005	1,253	4	1,020	35	134	3,648	2,805	134	709	2,062	63	253	352	638	1,026	580	2	4	58.2
Importation	336	154	-	97	5	13	301	141	11	49	133	5	23	22	30	53	64	4	-	56.5
Manufacture	57	11	-	8	-	7	16	13	1	3	9	-	3	-	2	3	7	-	-	57.9
Possession	980	91	1	85	1	4	888	642	15	41	299	3	84	22	67	80	232	6	1	46.9
Records, fraudulent prescriptions	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
Controlled Substances	1,675	323	-	301	8	18	1,352	950	53	143	901	33	123	100	216	111	953	7	1	36.0
Old law	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-	-
New law	1,675	323	-	301	8	18	1,352	950	53	143	901	33	123	100	216	111	953	7	1	36.0
Sales, distribution, or dispensing	1,095	233	-	221	3	9	862	705	46	111	666	38	99	84	171	97	196	2	1	38.1
Importation	65	15	-	15	1	-	50	36	-	2	15	1	5	1	6	2	15	-	-	39.7
Manufacture	65	12	-	8	-	4	57	33	3	12	20	3	1	3	9	2	17	-	-	33.6
Possession	371	54	-	49	-	5	317	196	4	17	91	11	27	13	30	10	131	5	-	30.0
Records, fraudulent prescriptions	14	8	-	8	-	-	6	6	-	-	-	-	-	-	-	-	6	-	-	-

[1]Includes sentences of more than 6 months which are to be followed by a term of probation (mixed sentences).
[2]A split sentence is a sentence on a 1-count indictment of 6 months or less in a jail-type institution, followed by a term of probation. 18, U.S.C. 3651. Included in these figures are mixed sentences involving confinement for 6 months or less on 1 count, to be followed by a term of probation on 1 or more other counts.
[3]Average sentence is not shown where the number of defendants sentenced to imprisonment was less than 25.

S.A.D.A. - Refers to commitments under 28 U.S.C. 2901(b) of the Narcotic Addict Rehabilitation Act.

FIGURE 29
Type of Sentence Imposed for Violation of Drug Laws Fiscal Year 1976
(Excludes Territories of Canal Zone, Guam and Virgin Islands)

District and type of drug law violations	Total defendants	Total convicted	Imprisonment[1] Number	Imprisonment[1] Average Sentence[2]	Probation	Fine and Other
THIRD CIRCUIT						
Delaware	38	21	14	14.6	6	1
Marihuana	-	-	-	-	-	-
Narcotics	1	1	1	36.0	-	-
Controlled substances	37	20	13	12.9	6	1
New Jersey	102	66	27	72.9	39	-
Marihuana	14	8	3	54.0	5	-
Narcotics	73	45	21	80.6	24	-
Controlled substances	15	13	3	38.0	10	-
Pennsylvania, Eastern	299	234	121	39.4	112	1
Marihuana	29	14	10	27.0	4	-
Narcotics	168	134	78	41.0	56	-
Controlled substances	102	86	33	39.2	52	1
Pennsylvania, Middle	37	29	21	35.4	8	-
Marihuana	9	5	4	30.8	1	-
Narcotics	6	5	4	36.3	1	-
Controlled substances	22	19	13	36.5	6	-
Pennsylvania, Western	66	61	38	52.9	21	2
Marihuana	3	3	-	-	1	2
Narcotics	42	39	26	55.8	13	-
Controlled substances	21	19	12	46.5	7	-
FOURTH CIRCUIT						
Maryland	197	146	77	59.1	67	2
Marihuana	58	35	11	36.5	22	2
Narcotics	106	87	57	63.5	30	-
Controlled substances	33	24	9	58.7	15	-
North Carolina, Eastern	47	40	28	86.6	12	-
Marihuana	11	8	7	54.9	1	-
Narcotics	20	17	12	137.0	5	-
Controlled substances	16	15	9	44.0	6	-
North Carolina, Middle	19	19	18	56.7	1	-
Marihuana	7	7	6	52.0	1	-
Narcotics	4	4	4	84.5	-	-
Controlled substances	8	8	8	41.3	-	-
North Carolina, Western	41	35	25	33.9	10	-
Marihuana	3	3	3	28.0	-	-
Narcotics	10	9	7	35.4	2	-
Controlled substances	28	23	15	34.4	8	-
South Carolina	39	33	18	31.1	15	-
Marihuana	36	31	17	30.8	14	-
Narcotics	2	1	1	36.0	-	-
Controlled substances	1	1	-	-	1	-
Virginia, Eastern	148	116	64	47.6	27	25
Marihuana	55	43	13	35.7	11	19
Narcotics	72	58	45	64.6	11	6
Controlled substances	21	15	6	30.0	5	-
Virginia, Western	7	5	4	54.8	1	-
Marihuana	5	4	4	54.8	-	-
Narcotics	1	-	-	-	-	-
Controlled substances	1	1	-	-	1	-